

Observations for Doctor Johnson

ag 32

January 26. 1775.

Crawford's Executors

OBSERVATIONS

FOR

Dr ALEXANDER JOHNSON, Pursuer;

AGAINST

CRAWFURD'S EXECUTORS, Defenders.

IN this cause, which is a question concerning the effect of an award or decret-arbitral, pronounced in Holland, your Lordships, upon considering informations on each side, were of opinion, that it would be proper to have something authentic upon Dutch law; and therefore, before giving judgment, your Lordships were pleased, on the 30th of November 1773, to pronounce the following interlocutor: "On report of the Lord Gar-denston, the Lords remit to his Lordship to call the parties, and, at his sight, to make up a state of the case, and to procure opinions from such lawyers in Holland as they shall think proper, what is the law of Holland in this case."

In consequence of this interlocutor, a case was drawn up, approved of by the Lord Ordinary, authenticated by the agents for the respective parties, and transmitted to Rotterdam by Sir William Forbes, James Hunter and Company, to Mr Livingston, their correspondent there, who procured the opinion of three Dutch counsellors; and the Lord Ordinary having appointed the case and opinion to be printed and put into your Lordships boxes,

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8th Feb. 1775.

Christian Klamper says
produced that in Holland
Deeds may be read in
English with a list of
of an English Officer of
Holland in a Dutch
and Deeds which, he
must take it in its
there is an Award or
to the court.

He says, I doubt whether
any thing to the court
may not be read in
English.
He says, if Deeds which can be
read in English are to be
to observe at all, they
are of Holland, and should
be given in French to the
to observe of a foreign Judge
He says, I am sure that
there is a contract which
a contract should be made
and read in French
necessarily of giving in
French of Holland
He says, that is, that in
Holland is more of Dutch law
than in the other. I think the
allow execution can be
as judgments.

Nov. 30. 1773. He says, that a Deed
of a foreign country is
not valid in the
judgment of the court
and is equally valid
in the court of the
Dutch law is not
of a contract which
is given in French of Holland
He says, that an award
is for the other
challenges can be
contested.

and
Find it is Deed arbitral is
challengeable but not in
the court but he can't enter
Dr Johnson to find contest.

and allowed either party to give in their observations thereupon, what follows is humbly offered for Dr Johnson.

And although it does appear from the opinion now under consideration, that the Dutch have not yet attained to the same state of perfection, as to the final validity of decreets-arbitral, honestly pronounced, that obtains in this country, by the salutary provisions of your Lordships; but that in Holland, a decreet-arbitral is pretty much the same with a sentence of an inferior judge, so that it would seem little security against repeated litigation, is obtained there by a reference; yet certain regulations are there laid down, by which awards may be more effectual for answering the good purposes intended by them.

In the *first* place, your Lordships will see from this opinion, that when the parties in a submission renounce all title to reduction, or relief, as is done in the submission, upon which the award now in question proceeds—though it seems these words, however plain, and however strong, are not legally understood to bar reduction—yet they have this effect, that although reduction may be competent, execution upon the award, in the mean time, will not be stopped: For the counsellors set forth, “ That the effect of this covenant, in submissions, consisteth therein, that the award may be laid into execution provisionally, under bail, and that the succumbent being inclined to come into reduction of such award, can only petition for a *mandamus* (or writ) of reduction, without the clause of inhibition.” And this is afterwards explained as follows: “ The party, in the mean time, and whilst the cause, in case of reduction, is depending, may lay the award into execution provisionally, under bail, that he shall return all and whatever shall be decreed by the sentence that shall be passed, in case of reduction, to have been paid too much, by the impetrant of the writ.”

And therefore, supposing a reduction were still competent in this case, the defenders would *at least be obliged* instantly to pay down to the pursuer, the full sum decreed to him by the arbiters, upon his finding bail to return what should come out to have been paid too much, upon an investigation into the merits of the award. And indeed, were it not that the pursuer is of a disposition exceedingly averse to wrangling, he would have no difficulty to agree to take his money, with that condition, as he is not in the least apprehensive that it would be in the power of the executors to point out

out any iniquity whatever in the decree of the worthy and respectable arbiters, mutually chosen by him and them ; for it is intreated, that your Lordships will consider, that all the allegations of injustice made by the defenders, are only the bold averments of one party, anxious at all events to involve the other in a tedious altercation, and that the pursuer can refute them before your Lordships, or any where else, as he did before the arbiters, although indeed that would require an immense production of books and other vouchers.

But the pursuer being of a peaceful temper, and by no means willing to enter into a contest with Mr Gilbert Mason, the acting executor, with the differences between whom and the pursuer it would be impertinent to trouble your Lordships ; and being humbly confident, that he has a right to obtain judgment upon this award, unclogged with any security on his part, he must beg leave to insist for such judgment, that he may at last have a final deliverance from all disputes with the defenders, whose constituent, the late Mr James Crawford, whatever they may pretend, did by no means consider the obligations in consequence of their transactions, to lie upon the pursuer's side, more than upon his own.

For your Lordships will be pleased to attend to the *second* query, which is in these words : “ Suppose, in this case, that the pursuer
“ had carried his action upon this award, and demanded execution
“ before the courts of law of Holland, would they admit the
“ plea of enorm lesion, or glaring injustice ? or, Would they grant
“ execution, without allowing any examination into the merits of
“ the question between the parties ? ”

And the opinion of the counsellors upon it is as follows : “ And
“ now proceeding to answer the second query, we the subscribed
“ need only remark, that from what hath been said, floweth
“ forth, that in supposition, that the pursuer had carried his
“ action upon the award in question, and demanded execution
“ before the courts of law in Holland, they would grant the same ;
“ and, in regard to the plea of *enorm lesion*, or glaring injustice,
“ and also the action of reduction, they would not admit the
“ same, and not allow any examination into the merits of the
“ question between the parties, if the reducent had omitted, (as
“ it seems to be the case here), to petition for relief of the submission,
“ and of the lapse of time : He would be repelled *a limine*
“ *judicii* ;

"judiciū; and he might impute it to himself, that he had not vigi-
lated for his right sooner."

The practice of Holland, in thus limiting the right of insisting for reduction of a decreet arbitral, is laid down by Voet in his Commentary on the Pandects, lib. 4. tit. 8. § 25. *Post annum, uti reformationis, ita et reductionis petenda licentia usa denegata; nisi impetrata fuerit adversus lapsum temporis restitutio, iustissimis causis eam indulgeri suadentibus.*

Indeed, if the principle of prescription is in any case salutary, it is most peculiarly so, when it secures the decrees of arbiters, of judges amicably chosen by parties themselves. Nothing surely is more to be wished, than a speedy prescription of the power of harrassing our neighbours, by renewing differences, and carrying on contention in various modes.

Were this cause to be decided by the law of Scotland, or by the general principles of law, it is clear, that the defenders could not be heard upon alledged iniquity in the decree of arbiters chosen by mutual consent of them and the pursuer. By resorting to the law of Holland, they have obtained considerable delay; but although it comes out, that, by that law, iniquity may be made the foundation of reducing a decreet-arbitral; it also comes out, that, by the same law, such plea cannot be received after a certain time. The defenders then are barred from their reduction by the law of Holland upon which they rest; for they will not be allowed to lay hold of one part of that law and reject the other. If the law of Holland is to be the rule, they must take it entire as it really stands, and not imagine that they are to have so unreasonable an advantage, as that your Lordships should adopt the law of Holland, so far as it is favourable to them, and disregard it so far as it is unfavourable, when it is only by uniting the two parts of it together that it is tolerably rational.

The only thing that the pursuer sees that the defenders can possibly urge here is, a plea, that, as they acted for the children of Mr Crawford, some of whom are minors, there should be a greater latitude allowed on that account: But this plea, if urged, will, it is hoped, appear to your Lordships of no avail; for if there had been such an exception, it is reasonable to suppose, that it would have been mentioned in the opinion of the Dutch counsellors, or that it would be found in Voet; neither of which is the case. And your

your Lordships will be sensible, that such an exception would be exceedingly improper, as it would, upon many occasions, deprive minors of the benefit of arbitration, as no body would chuse to enter into a submission where they were concerned, if, in such cases, matters might be kept open for reduction for many years. The award in question was pronounced so long ago as the 12th of May 1769; but there never was any objection made to it till the 12th November 1772, a considerable time after the pursuer had brought his action into this Court; and after the defenders had been driven from a most calumnious defence, that Mr Gibson, who acted for them in Holland, had not powers to enter into the submission.

As there can be no doubt, that the defenders are obliged, at any rate, to pay to the pursuer directly the sum awarded, upon bail for repayment, so far as the award shall be found to be unjust, the pursuer imagines, that although your Lordships should find a reduction still competent, the defenders will not be very ready to give farther trouble *sub periculo* of full costs: But he is humbly hopeful, that your Lordships will find the defenders barred from reduction; and will therefore decern in terms of the libel.

In respect wherof, &c.

JAMES BOSWELL.

your Lordships will be sensible, that such an exception would be
 exceedingly improper, as it would, upon many occasions, deprive
 minors of the benefit of a stipulation, as no body would chuse to
 enter into a stipulation where there were no consideration, it is such ca-
 ses, matters might be kept open for many years. The
 award in question was pronounced to be also as the result of a
 1709; but their Lordships were of opinion, that it is the result
 November 1772, a report being made after the parties had brought
 his action into the Court; and after the defendants had been dis-
 miss from a most calamitous situation, that Mr. Gibson, who acted
 for them in Holland, had been ordered to enter into the stipu-
 lation.

As there can be no doubt, that the defendants are obliged, as a
 party, to pay to the plaintiff, the sum awarded, upon bail
 for repayment, in order to be enabled to be paid to be paid, the
 plaintiff is entitled to the sum awarded, and is entitled to the
 decision that the defendant will not be very ready to
 give further trouble to the Court, but he is entitled to
 recover, that your Lordships will find the defendant bound from
 reduction; and will therefore decree in favor of the plaintiff.

At witness whereof, &c.

JAMES BOSWELL.